89-1521

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No. _____

SUPREME COURT OF THE UNITED STATES

October, 1989, Term

CRAIG ALAN LACKEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari from the
United States Court of Appeals
for the
Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the trial evidence show that it was reasonably foreseeable to the Defendant that the scope of the conspiracy would include the distribution of more than five kilograms of cocaine, as opposed to the much lesser amounts with which he was personally involved?

2. Does the structure of the federal sentencing guidelines deny due process?

3. Does the provision of the federal sentencing guidelines granting the government the exclusive right to seek a departure from the guidelines to reduce the Defendant's sentence deny him due process and violate the doctrine of separation of powers?

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PROCEEDINGS BELOW AND JURISDICTION

The case was tried at the bench by the United States District Court for the Eastern District of Virginia, which exercised its jurisdiction under 28 U.S.C. 3231. No written opinion or finding was issued.

The case was heard on appeal by the United States Court of Appeals for the Fourth Circuit, and a written opinion was issued, but not published (App. 38). Judgment was entered by the Court of Appeals on January 12, 1990. The Defendant's suggestion for a rehearing en banc, filed without a petition for rehearing, is pending in the Court of Appeals.

The Court of Appeals has not certified to the Attorney General the fact that the constitutionality of an act of Congress has been drawn into question, as allowed by 28 U.S.C. 2403(a).

This Court has jurisdiction to review the said decision of the Court of Appeals under 28 U.S.C. 1254(1).

PROVISION OF SENTENCING GUIDELINES WHICH IS AT ISSUE

Section 5k1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has made a good faith effort to

provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following conduct:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

The Defendant below, Petitioner herein, was indicted, tried at the bench and convicted by the United States District Court for the Eastern District of Virginia, J. Albert V. Bryan, Jr., of (1) violation of 21 U.S.C. Section 846, conspiracy to distribute cocaine and to possess cocaine with intent to distribute (Sch. II) in an amount greater than five kilograms; (2) violation of 21 U.S.C. Section 841(a)(1), distribution of cocaine (Sch. II) in an amount less than 25 grams; and (3) violation of 21 U.S.C. Section 841(a)(1), possession of cocaine with intent to distribute (Sch. II) in an amount less than 25 grams.

The undersigned counsel did not represent the Defendant until after the trial and conviction, but prior to sentencing.

The Defendant was sentenced to 120 months imprisonment on each of the three convictions, with each sentence to run concurrently with the others. Five years of supervised release

are to follow, and the payment of $300.00 restitution to the government and a special assessment of $50.00 were also imposed.

With respect to the conspiracy conviction, the Defendant was a used car salesman and buyer who purchased cocaine, for cash and as a part of the price of various automobiles, from a used car dealer who was also a drug dealer (Tabar). Tabar has been convicted of operating a continuing criminal enterprise. The Defendant purchased one ounce or less on each occasion. He was not expressly asked by Tabar or anyone else to redistribute, and he did not expressly agree to do so. (The trial court found a tacit agreement to redistribute.) There was no evidence that the Defendant had express knowledge of the roles of any of the participants in the conspiracy other than Tabar and those persons who accompanied him from time to time, such as his driver, and one other person from whom the Defendant purchased small amounts of cocaine on a few occasions (Zaboli). Defendant knew

that Zaboli worked for Tabar in Tabar's used car business.

As to the distribution conviction, the Defendant's ex-girlfriend testified that he sold her one-eighth of an ounce of cocaine for $300.00, knowing that it would be redistributed by her.

The conviction for possession with intent to distribute arose from a purchase by the Defendant where the circumstances were not described in the evidence, other than the approximate date and the parties to the sale, i.e., Defendant and Tabar. However, it was implied that the circumstances were similar to a previous attempt by the Defendant to purchase an ounce of cocaine from Tabar, in the course of which attempt the Defendant referred to a friend of his who wanted to obtain cocaine from the Defendant.

The evidence led the trial court to conclude that the Defendant's role in the conspiracy was that of a user of cocaine who distributed

at a low level, and the trial court found the Defendant's role to be minimal.

The Defendant, having assisted the government after his conviction and desiring to continue and complete such assistance, moved for a continuance to allow him time to do so before he was sentenced and incarcerated. The government was unwilling to make a motion for departure from the federal sentencing guidelines under Section 5K1.1 thereof, until such assistance was completed. The said motion for a continuance was denied.

Under the guidelines the Defendant qualified for a reduction of the applicable severity level to 28, due to his minimal role, which would have reduced the range of the period of imprisonment to 78-97 months. Notwithstanding, the trial court found that a mandatory minimum sentence of 120 months was applicable to the conspiracy conviction and imposed the same. The applicable range prior to the said reduction (based on a severity

level of 32) did include a sentence of 120 months.

On appeal to the United States Court of Appeals for the Fourth Circuit, the Defendant contended that the evidence at trial did not show that he knew that the scope of the conspiracy involved an amount in excess of five kilograms, as opposed to the much smaller amounts with which he was personally involved, or that the actual scope was reasonably foreseeable to him. However, the Court of Appeals found the factual circumstances sufficient for the trial court to have concluded that the scope of the conspiracy was reasonably foreseeable to the Defendant.

On appeal, Defendant also attacked the Federal Sentencing Guidelines, but the Court of Appeals found that the structure of the guidelines did not deny him due process, and that the provision of the guidelines granting the government the exclusive right to move for a reduction of sentence under the said Section 5k1.1 did not deny due process and did not

violate the doctrine calling for the separation of powers.

The final issue before the Court of Appeals was whether the imposition of the statutory minimum sentence denied the Defendant equal protection of the law, where, but for the said statutory minimum, the Defendant's minimal involvement would have resulted in a lessor sentence under the guidelines. The Court of Appeals held that the Defendant was not denied equal protection.

Thus, the judgment and imposition of sentence were affirmed.

The same issues are raised herein as were raised in the Court of Appeals, except with respect to equal protection of the law, which is not included in this Petition.

SUMMARY OF ARGUMENT

1. The evidence did not show any specific knowledge by the Defendant that the scope of the conspiracy included the distribution of more than five kilograms of cocaine. Further, the evidence did not show any circumstance from which the Defendant could reasonably have concluded or foreseen that the conspiracy did or would involve such a large amount of cocaine. In the absence of such knowledge or circumstances, the Defendant cannot be held liable for a conspiracy to distribute more than five kilograms of cocaine, as opposed to the much smaller amount with which he was involved.

2. The federal sentencing guidelines are structured so as to deny due process, because of the restriction on the Defendant's right to receive an informed and articulated sentence based on the discretion of a judge. This issue has been decided by a number of federal courts, but not by this Court. Defendant's position relies on the minority rule.

3. Section 5K1.1 of the federal sentencing guidelines, which provides that only the government can initiate the trial court's consideration of a departure from the guidelines based on a defendant's assistance to the government, is unconstitutional, and the Defendant should have been able to raise the issue before his sentencing. The said provision denies due process because it denies an opportunity to be heard on a particular issue to one party while granting it to another party, with no reasonable basis for doing so. The said section also violates the doctrine of the separation of powers by preventing the judicial branch, sua sponte, from considering a material issue in a cause of action after the parties are within its jurisdiction and the issues have been joined, and instead placing with the executive branch the exclusive power to allow such issue to be considered.

ARGUMENT

1. Evidence of Conspiracy. In Pinkerton v. U.S., 328 U.S. 640, 647, 66 S.Ct. 1180, 1184 (1946) it was held that an act such as carrying the scope of the instant conspiracy beyond the distribution of five kilograms must have been "within the scope of the unlawful project," or one of the "ramifications of the plan which could ... be reasonably foreseen as a necessary or natural consequence of the unlawful agreement," in order for the evidence to support a conviction.

The evidence in the instant case did not show any specific knowledge by the Defendant that the scope of the conspiracy included the distribution of more than five kilograms of cocaine, and in its response below, the government agreed. However, the government contended that the evidence established the following six factual circumstances from which the trial court could conclude that it was reasonably foreseeable to the Defendant that

the conspiracy did or would involve the larger amount of cocaine:

(1) The Defendant was a used car salesman who purchased cocaine from another used car salesman (Tabar) on a regular basis over a period of 18-24 months, sometimes accepting cocaine as a part of the purchase price of an automobile. Tabar was a drug dealer who testified that he operated a network through which he distributed more than five kilograms of cocaine.

(2) The Defendant purchased half-ounce and ounce quantities of cocaine from Tabar during the said period, on 40-50 occasions, totalling approximately one kilogram of cocaine.

(3) The Defendant had met participants in the conspiracy other than Tabar and received cocaine from them, as well.

(4) The cocaine he received from Tabar was readily available to the Defendant.

(5) The Defendant and Tabar used a beeper system to arrange the drug transactions, with

the Defendant having his own code number for Tabar's beeper.

(6) There were a number of participants in the drug distribution network.

Defendant's position with respect to these six circumstances is as follows, with each numbered point below corresponding to the like-numbered circumstance cited by the government. The points which are admittedly significant are analyzed below, following the numbered points:

(1) That the Defendant knew Tabar was a drug dealer and that cocaine was accepted by the Defendant from Tabar in the course of automobile sales prove nothing about the Defendant's knowledge of the scope of the conspiracy. However, the relatively long time period is significant.

(2) The quantity of cocaine purchased and the frequency of purchase are significant.

(3) The direct participation of persons other than the Defendant and Tabar is significant.

(4) That the cocaine was readily available proves nothing with respect to the Defendant's knowledge of the scope of the conspiracy, considering the small amounts involved in the individual purchases.

(5) That the Defendant was able to communicate with Tabar readily proves nothing with respect to the Defendant's knowledge of the scope of the conspiracy, especially in light of the automobile transactions in which they engaged independently of the drug transactions.

(6) The number of other participants in the drug distribution network is significant.

Thus, the significant circumstances as to whether the Defendant knew or reasonably should have known of the large scope of the conspiracy may be summarized as follows:

The Defendant (a) purchased one-half ounce or ounce quantities of cocaine, (b) on 40-50 occasions, (c) over a period of 18-24 months. Not only Tabar, (d) but associates of Tabar as well, participated directly in the

transactions, and (e) there were more than one of such associates.

The controlling question is whether any of the five lettered facts set forth above, individually or in any combination with one another, reasonably leads to the conclusion that the Defendant knew or reasonably should have known that the scope of the conspiracy involved more than five kilograms of cocaine.

The total quantity purchased, the frequency of the individual purchases and the relatively long time period involved, taken together, certainly would tend to indicate the requisite knowledge, but only if there were evidence that the Defendant knew or should have known that Tabar and his associates had enough other customers to distribute more than five kilograms. In fact, in the absence of such evidence, one can only conclude that the Defendant knew or should have known the scope of the conspiracy to involve only approximately one kilogram of cocaine, i.e., the amount he purchased.

The Court will note that the record is devoid of any evidence that the Defendant knew that Tabar and his associates had any customers other than the Defendant, much less enough other customers to distribute more than five times as much as they sold to the Defendant. Further, there is no evidence from which a conclusion could be drawn that any such customers existed, other than the evidence which is described above.

With respect to the direct participation of other persons, the Court will note that Tabar's associates participated either with Tabar or in his place, where the Defendant was aware that they were not operating other than as substitutes for Tabar. As to the number of these other participants, the Court will note that only three persons other than Tabar were known by the Defendant to be involved, only one of whom, Zaboli, was shown by the evidence to have distributed to the Defendant other than in the presence of Tabar. (App. 51-54).

Thus, the participation of persons other than Tabar and the Defendant, as revealed to the Defendant, was not such that the Defendant knew or should have known of the large scope of the drug operations, as where, e.g., the number of participants and their independence from Tabar would indicate an extensive distribution network.

Further, the Court will note that there is only one significant, independent connection between the Defendant and any of the eight persons other than the Defendant that Tabar named as co-participants in his drug network (Ramazani, "Kevin", Quiseda, Zaboli, Ziarati, Parker, Sindi, and Assadi). (App. 46-50). This connection is that Tabar met Zaboli through the Defendant, and Zaboli became Tabar's manager in Tabar's automobile business. (App. 49). There was no evidence of a prior drug connection between Zaboli and the Defendant, only an automobile connection, i.e., they were both in the used car business.

As to the drug-related connections between the Defendant and the other members of the conspiracy, Tabar indicated that the Defendant did not know Ramazani or "Kevin" (App. 50), and the only evidence that he knew Quiseda refers to the automobile business (App. 50). There was evidence that Zaboli, Sindi, and Ziarati were connected with drug sales to the Defendant, with the Defendant's knowledge, but only through or with Tabar. (App. 51-54).

As to Parker and Assadi, there is no evidence of any knowledge of them on the Defendant's part. They are not mentioned in the evidence, after Tabar's initial description of his drug operation.

Finally, the Defendant's statement at the time of his arrest included considerable detail about his dealings with Tabar, but mentioned no one else. (App. 54-57).

Therefore, based on the foregoing analysis of the trial evidence, Defendant contends that such evidence did not contain factual circumstances from which the trial court could

conclude beyond a reasonable doubt that Defendant could have reasonably foreseen that the conspiracy did or would involve distribution of the greater amount of cocaine.

The Court will note that the Court of Appeals relied upon only four circumstances in finding that the evidence was sufficient for the trial court to conclude that the actual scope of the conspiracy was foreseeable. (App. 41-42):

(a) "Lackey bought cocaine from Tabar, his supplier, on over forty occasions for a total of nearly one kilogram."

(b) "Lackey also purchased cocaine from other members of Tabar's distribution scheme."

(c) "Tabar himself testified that his own supplier had supplied Tabar with forty to fifty kilograms of cocaine which Tabar redistributed to other members of the network, including Lackey."

(d) "Lackey met other members of the Tabar's cocaine distribution network at

various times throughout the duration of the conspiracy."

With respect to the ruling of the Court of Appeals, Defendant contends that the mere fact that Tabar was involved in a conspiracy of very large scope is immaterial to a determination of whether Defendant knew of or should have foreseen such scope.

As to the frequency of the transactions and the total quantity purchased, as noted above there was no evidence that Defendant knew or should have known that Tabar had any customers other than Defendant, a point which is critical to the logic of the conclusion which the panel found to be rational, i.e., the frequency and quantity with which the Defendant was involved made it reasonably foreseeable to Defendant that Tabar was going to move more than five times the quantity of drugs which Defendant purchased from him.

With respect to the participation of other persons, only Zaboli was shown by the evidence to have dealt with Defendant independently of

Tabar. Defendant contends that the independent and limited participation of one other seller is insufficient for a rational factfinder to conclude beyond reasonable doubt that Defendant knew or should have foreseen that Tabar was going to move more than five times the quantity of drugs which Defendant purchased from Tabar.

Defendant contends that to rule that it is rational to find that the actual scope of the conspiracy was reasonably foreseeable to the Defendant, based only on the proof in question establishes a criterion so easily met as to essentially eliminate the need for the government to prove the requisite element of the crime, i.e., knowledge or foreseeability of the scope of the conspiracy.

By setting a criterion so low as to essentially eliminate any need for the government to prove knowledge or foreseeability, the panel's opinion has indirectly negated the ruling of the United States Supreme Court in Pinkerton, supra, that

the scope must have been known to be "within the scope of the unlawful project" or one of the "ramifications of the plan which could ... be reasonably foreseen as a necessary or natural consequence of the unlawful agreement". 328 U.S., at 647. 66 S.Ct., at 1184. For this reason Defendant contends that this Court should grant a writ of certiorari, in that the Court of Appeals has decided a federal question in a way which is in conflict with an applicable decision of this Court.

Further, in U.S. v. Alvarez, 755 F.2d 830, 851, n.27 (11th Cir. 1985) it was noted that, where the act was unintended as a part of the plan and was carried out by other members of the conspiracy, vicarious liability will attach only to "conspirators who played more than a 'minor' role in the conspiracy." Herein, the Defendant's role was found to be minimal.

In U.S. v. Mulherin, 710 F.2d 731, 737 (11th Cir. 1983), it was held that the prosecution must prove "that the defendant knew the

essential objectives of (the) conspiracy, and that armed with that knowledge he participated." Certainly, one of the essential objectives of the conspiracy in the instant case was to move more than five kilograms.

In U.S. v. Boucher. 796 F.2d 972, 975 (7th Cir. 1986), the Court found that it was "clear that (the conspirators) understood that (the defendant) was master-minding a large-scale (drug) distribution scheme." Herein, there was no evidence that the Defendant knew what Tabar was doing, other than in his dealings with the Defendant.

It is true that knowledge of a broader conspiracy can be inferred from even a single act of participation, if such act is of a character as to "justify an inference of knowledge of a broader conspiracy." U.S. v. Torres, 503 F.2d 1120, 1123 (2d Cir. 1974). However, the pertinent point herein is that there is no evidence which would justify an

inference of such knowledge by the Defendant where his acts were minimal.

As an example, the Court will note that the decision in U.S. v. Gallishaw, 428 F.2d 760 (2d Cir. 1970), supports Defendant's position herein. In that case the defendant had provided a machine gun, knowing it was to be used for a robbery. Nonetheless, the court held that independent proof of his knowledge of the character of the intended victim was necessary to convict him of conspiring to rob a federally-insured bank, as opposed to some other type of victim.

Another example is U.S. v. Hysohion, 448 F.2d 343 (2d Cir. 1980), wherein the court held that independent proof was required of the defendant drug dealers' knowledge that the drugs they were selling were imported, where they were charged with conspiring to distribute drugs that had been unlawfully imported. This was notwithstanding that it was clear that the defendants had intentionally sold the drugs.

Yet another example is U.S. v. Tavoularis, 515 F.2d 1070 (2d Cir. 1975), wherein the government relied on the inference to be drawn from the defendants' possession of recently stolen Treasury bills to prove that the defendants knew that the bills had been stolen from a bank, rather than from some other source. The government's case failed, because the evidence of possession alone simply was not enough to justify such an inference.

A final example is U.S. v. Hernandez, 625 F.2d 2 (1st Cir. 1980), wherein the court ruled that the defendant's sale of a small amount of drugs could not lead to the conclusion that the defendant knew that a much larger amount was being distributed by the network of which he was a part, absent independent proof.

Based on the foregoing cases from the Courts of Appeals for the First, Second, Seventh and Eleventh Circuits, Defendant contends that this Court should grant a writ of certiorari, in that the Court of Appeals for the Fourth

Circuit has rendered a decision in conflict with cases from four other circuits.

2. Denial of Due Process by Structure of Guidelines. The federal sentencing guidelines are structured so as to deny due process, and the Defendant should not have been sentenced thereunder, as to the convictions not involving a mandatory minimum sentence. The said denial of due process arises from the restriction on the Defendant's right to receive an informed and articulated sentence, based on the discretion of a judge. This issue has been decided by a number of federal courts, but not by this Court.

The Court will please note that the Defendant's position relies on the minority rule, which has been adopted in the following cases:

U.S. v. Brodie
686 F.Supp. 941 (D. D.C. 1988)

U.S. v. Elliott
684 F.Supp. 1535 (D. Colo. 1988)

U.S. v. Martinez-Ortega
684 F.Supp. 635 (D. Ida. 1988)

U.S. v. Ortega-Lopez
684 F.Supp. 1506 (C.D. Col. 1988)

These trial courts have held that the restrictions on the flow of information and the lessening of the sentencing judge's discretion which result from the guidelines lead to a denial of due process, in that each criminal defendant has the right to a sentence based on an informed and articulated exercise of discretion by the judge before whom the defendant appears, rather than a sentence resulting from the mechanical application of formulae derived by a commission before which the defendant has not appeared. The said minority rule is that the process of arriving at such an informed and articulated sentence is unduly hindered by the guidelines.

The contrary, majority rule has been established in the following cases:

U.S. v. Allen, 873 F.2d 963 (6th Cir. 1989)

U.S. v. Belgard
694 F.Supp. 1488 (D. Ore. 1988)

U.S. v. Bolding
876 F.2d 21 (4th Cir. 1989)

U.S. v. Brittman
872 F.2d 827 (8th Cir. 1989)

U.S. v. Costelen
694 F.Supp. 786 (D. Colo. 1988)

U.S. v. Frank
864 F.2d 992 (3rd Cir. 1988)

U.S. v. Franz
693 F.Supp. 687 (N.D. Ill. 1988)

U.S. v. Seluk
691 F.Supp. 525 (D. Mass. 1988)

U.S. v. Vizcaino
870 F.2d 52 (2d Cir. 1989)

U.S. v. Weidner
692 F.Supp. 968 (N.D. Ind. 1988)

These courts have held that the guidelines do not unduly restrict the flow of information or the discretion of the trial court in sentencing each defendant in the appropriate manner.

The Court will note that this issue was not addressed in Mistretta v. U.S., ____U.S.____, 109 S.Ct. 647 (1989), in which this Court has addressed the sentencing guidelines. Thus, Defendant contends that this Court should grant a writ of certiorari, in that the Court of Appeals has decided an important question

of federal law which has not been, but should be, settled by this Court.

Upon the granting of such a writ, Defendant would urge this Court to adopt the said minority position, because it is the better reasoned. Criminal sentencing is inherently an interaction between two individuals, the judge and the defendant, which is so difficult to carry out that there is truly never a perfect result. Thus, the effort of Congress to resolve the sentencing dilemma is admirable, but there are some problems in our society which must be tolerated in order to maintain rights which are more important than those affected by such problems. That individual criminals and individual crimes differ greatly, and that all defendants cannot be sentenced by the "same judge" are such problems.

3. Lack of Constitutionality of Section 5K1.1. This section of the federal sentencing guidelines, which provides that only the

government can initiate the trial court's consideration of a departure from the guidelines based on a defendant's assistance to the government, is unconstitutional on two grounds, and the Defendant should have been able to raise the issue of departure from the guidelines before his sentencing.

First, the said provision denies due process because it denies an opportunity to be heard on a particular issue to one party while granting it to another party, with no reasonable basis for doing so. It is a basic premise of due process that a party be given a fair opportunity to be heard. Such an opportunity is indeed given to a defendant under Section 5K1.1, but only after the issue of reduction of sentence is placed before the court by the government. It is the latter aspect which denies due process to a defendant.

If both parties were barred from raising the issue, a defendant would have to approach the problem differently, but where only he is

barred, and the issue is material to him, he has been denied a fair opportunity to be heard, i.e., an opportunity comparable to that afforded the government.

The second ground is that Section 5K1.1 violates the doctrine of the separation of powers by preventing the judicial branch, sua sponte, from considering a material issue in a cause of action, after the parties are within its jurisdiction and the issues have been joined, and instead placing the exclusive power to allow such issue to be considered in the executive branch.

The pertinent aspect of the section is that a court cannot, without governmental initiative, consider a material issue, at a point in the proceedings where the matter is clearly and entirely within the scope of the authority of the judicial branch (as opposed to a point where the executive branch is in control, e.g., prior to indictment). This impairment of the judicial function by the Congress is itself a violation of the

separation doctrine. However, the subject constitutional defect is more extensive, because the executive branch, through the prosecutor, is given the exclusive power to place the issue before the court.

Thus, for no valid reason, the legislative branch has attempted to deny a power to the judiciary (to consider the issue sua sponte), while maintaining a similar power in the executive branch (to have the issue considered by the court), where such a power of the court is clearly within the scope of the authority of the judiciary, and where the exercise of the said exclusive power of the executive can only be effective upon the exercise of the separate power of the judiciary to decide the issue.

In the absence of some valid reason for (a) denying the Defendant a fair opportunity to be heard, and (b) granting the executive branch the exclusive right to raise the subject issue, Section 5K1.1 is unconstitutional, and no such reason exists.

Therefore, the Defendant should have received the opportunity to have the trial court consider his assistance to the government as a basis for a departure from the guidelines and a possible reduction of his sentence, inasmuch as the trial court had the discretion under the guidelines to disregard the statutory minimum sentence.

The Court will note that Section 5K1.1 has recently been held constitutional in U.S. v. Francois, 889 F.2d 1341 (4th Cir. 1989), as well as in the instant case. Therein, U.S. v. Musser, 856 F.2d 1484 (11th Cir. 1988), was followed, inasmuch as a similar provision had been attacked in the latter case on the same grounds as set forth by Defendant herein. The Francois court held that, since the defendant had no constitutional right to a sentence reduction, it was not violative to restrict his right to move the sentencing court for a reduction, inasmuch as Section 5K1.1 had a rational basis, i.e., the government was in the best position to evaluate the defendant's

assistance, with respect to whether it should be put before the court.

Thus, Defendant contends that this Court should grant a writ of certiorari, in that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

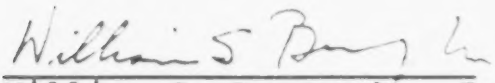
The relief sought by the Defendant is the remand of his conspiracy conviction for a new trial to determine the extent of his knowledge of the scope of the conspiracy, or the reasonable forseeability of the same.

Further, the Defendant seeks remand of the possession and distribution convictions for a new trial on grounds that the evidence concerning the latter charges is intertwined with the evidence of conspiracy.

Still further, if, upon a new trial, he is convicted of offenses which are not subject to a statutory minimum sentence, the Defendant

seeks to be sentenced under criteria other than the Federal Sentencing Guidelines

Respectfully submitted,



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APPENDIX TO THE

PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5440

UNITED STATES OF AMERICA

Plaintiff - Appellee

versus

CRAIG ALAN LACKEY

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR-89-107-A)

Submitted: November 30, 1989
Decided: January 12, 1990

Before PHILLIPS and SPROUSE, Circuit Judges, and WINTER, Senior Circuit Judge.

William S. Burroughs on brief for Appellant. Henry E. Hudson, United States Attorney; Liam O'Grady, Assistant United States Attorney, on brief for Appellee.

PER CURIAM:

Craig Alan Lackey was indicted, tried at the bench, and convicted by the United States District Court for the Eastern District of

Virginia for violations of 21 U.S.C. para.846 (conspiracy to distribute cocaine) and para. 841(a)(1) (possession of cocaine with intent to distribute). The district court convicted Lackey of both offenses and sentenced him to the ten-year mandatory minimum sentence required by 21 U.S.C. para. 841(b)(1). Lackey appeals to this court alleging that the evidence is insufficient to sustain the district court's findings. Lackey further submits that various aspects of the Sentencing Guidelines are unconstitutional. Lackey finally argues that imposition of 21 U.S.C. para. 841(b)(1)'s mandatory minimum sentence violates the equal protection clause of the fifth amendment. For the following reasons we affirm.

I

Lackey, a used car salesman, purchased cocaine for cash and in trade as part of the price of various automobiles from Amin J. Tabar. Tabar, the head of the distribution network alleged in this case, pled guilty to

a continuing criminal enterprise in which Tabar distributed thirty to forty kilograms of cocaine to his various distributors including Lackey. Lackey distributed the cocaine he received from Tabar and others to friends and acquaintances. Lackey does not appear to dispute the existence of a conspiracy to distribute more than five kilograms of cocaine. See Appellant's Brief at 6 ("Certainly, one of the essential elements of the conspiracy in the instant case was to move more than five kilograms [of cocaine]."). Nor does Lackey appear to dispute the trial judge's finding that he was involved in a conspiracy to distribute cocaine.

II

Lackey first argues that the government's evidence was insufficient to support a finding that he reasonably could have foreseen that the object of the conspiracy involved more than five kilograms of cocaine such as to subject him to an increased

minimum sentence under 21 U.S.C. parta.301(b)(1)(A)(ii)II. Preliminarily, we discuss the appropriate standard of review. Challenges to the sufficiency of the evidence are measured by the standard set forth in United States v. MacDougall, 790 F. 2d 1135, 1151 (4th Cir. 1986): the question is not whether this court is convinced of Lackey's guilt beyond a reasonable doubt. Rather, viewing the evidence in the light most favorable to the government, we must ask whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Lackey's liability for this conspiracy extends to co-conspirator's acts done in furtherance of the conspiracy, and to acts reasonably foreseen as a necessary of natural consequence of the unlawful agreements. See Pinkerton v. United States, 328 U.S. 640, 647-48 (1945).

In the instant case, the record evidence viewed in the light most favorable to the government indicates that Lackey bought

cocaine from Tabar, his supplier, on over forty occasions for a total of nearly one kilogram. See J. A. at 16, 36. Lackey also purchased cocaine from other members of Tabar's distribution scheme. Tabar himself testified that his own supplier had supplied Tabar with forth to fifty kilograms of cocaine which Tabar redistributed to other members of the network, including Lackey. See J.A. at 9-16. Finally, Lackey met other members of Tabar's cocaine distribution network at various times throughout the duration of the conspiracy. In light of these facts, a rational factfinder could have found beyond reasonable doubt that it was reasonably forseeable to Lackey that the conspiracy involved more than five kilograms of cocaine.

III

Lackey next mounts three attacks upon the constitutionality of his sentence. Lackey first argues that the Federal Sentencing Guidelines are structured such as to deny him

due process arising from the restriction on Lackey's right to receive an informed and articulated sentence. We recently rejected this argument in United States v. Bolding, 876 F.2d 21, 23 (4th Cir. 1989) (Guidelines do not violate fifth amendment due process). Lackey next argues that the Guidelines are unconstitutional because they deprive him of the right to raise a para. 5K1.1 motion to reduce his sentence unless that government first makes such a motion. Again, this court recently rejected this argument in United States v. Francois, No. 88-5110, slip op. at 8, 9 (4th Cir. Nov. 22, 1989).

Lackey finally argues that imposing the minimum sentence mandated by 21 U.S.C. para. 841(b)(1) instead of a lower Guidelines sentence that would apply in the absence of the statutory minimum "leads to a denial of equal protection of the law, because it results in the sentencing of members of the class solely on the basis of the nature of the crime, in disregard of the other

pertinent sentencing factors which Congress intended should be taken into account."[1] Appellant's Brief at 13. Lackey defines the class of people denied equal protection as those who,

> but for the imposition of a mandatory minimum sentence, would receive lesser sentences because of their qualification for sentence reduction under the federal sentencing guidelines, based on their minimal roles in the respective offenses of which they have been convicted.

Id.

Where a statute does not discriminate on racial grounds or against a suspect class, Congress' judgment will be sustained so long the legislative means bear a reasonable relation to a proper legislative purpose. See United States v. Holmes, 838 F. 2d 1175, 1177 (11th Cir. 1988). Here, the challenged statutory provision is contained in the Anti-Drug Abuse Act of 1986, and is "rationally __

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1 The Guidelines themselves provide that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." Guideline para. 5G1.1(b).

related to the Act's objective of protecting the public health and welfare by implementing stiff and certain penalties for those who violate federal drug laws." Id. In imposing stiff minimum penalties even on persons who under Guideline para. 3B1.2 could be found "minimal" participants, Congress could rationally have concluded that distribution networks dealing in large quantities of cocaine posed a special threat sufficient to warrant such penalities even for "minimal" participants. We cannot say that 21 U.S.C. para 841(a) denies Lackey the equal protection of the laws. Cf. id. at 1178 ("Believing that Section 8419b)(1) is rational, we conclude that it denies [defendant] neither due process nor equal protection under the fifth amendment.").

Accordingly, for the above stated reasons, we affirm the district court. We dispense with oral argument because the dispositive issues recently have been decided authoritiatively. AFFIRMED.

EXCERPTS FROM TRIAL TRANSCRIPT

DIRECT EXAMINATION OF AMIN J. TABAR

(Page 8) BY MR. O'GRADY:

Q. Directing your attention to the period of 1987 through 1989, you were distributing cocaine to other individuals here in the Eastern District of Virginia as well in the Washington metropolitan area, is that correct?

A. That's correct.

Q. And one of your sources of supply was Farshad Ramazani.

A. Absolutely, correct.

(Page 9) BY MR. O'GRADY:

Q. Do you know Alfred Al Quiseda (phonetic)?

A. Yes, I do.

Q. Did you have any asociation with cocaine with Mr. Quiseda?

A. Yes, I did.

Q. Did you distribute cocaine to him?

A. Yes, I did.

(page 10) BY MR. O'GRADY:

Q. And do you know a Jerry Zaboli?

A. Yes, I do.

Q. Is he also know as Shariar (phonetic) Zaboli?

A. Yes, sir.

Q. Was he involved in this cocaine network?

A. Yes, sir.

Q. What was his role in this conspiracy?

A. His role was to get the cocaine from California or somewhere else to bring it in Washington, D.C.

Q. He was a courier for you?

A. Yes, you can say that, right. He was courier and he was also buying it for himself also.

Q. He was buying cocaine himself?

A. Yes, sir.

(Pages 12-13) BY MR. O'GRADY:

Q. Do you know Nassar Ziarati?

A. Yes, sir.

Q. Was he involved in this cocaine conspiracy?

A. Yes.

Q. What was Mr. Ziarati's role?

A. Ziarati really didn't have that kind of role, but he bring it to me sometimes, and just bought it, and he was with me when I was doing budiness with other people.

Q. Did he ever travel and pick up cocaine from some of these sources for you?

A. Yes, he did.

Q. How about Raymond Lee Parker? Do you know Mr. Parker?

A. Yes, I heard of him. Yes, I know him, you know.

Q. Did you ever sell any cocaine to Mr. Parker?

A. Yes, I did.

(Page 13-14) BY MR. O'GRADY:

Q. How about Jameel Sindi? Do you know Mr. Sindi?

A. Yes, sir.

Q. Was he a cocaine conspirator with you?

A. Yes, sir.

Q. Did you sell him any cocaine?

A. Yes, I did sell him.

(Page 14) BY MR. O'GRADY:

Q. How about Mohamed Assadi? Do you know Mr. Assadi?

A. Yes, I do.

Q. Did you have occasion to sell him any cocaine?

A. I'm sorry?

Q. Did you sell him any cocaine?

A. Yes, I did.

(Page 15) BY MR. O'GRADY:

Q. And when did you first meet Mr. Lackey?

A. I met Mr. Lackey through Jerry Zaboli.

Actually, Mr. Lackey knew Jerry Zaboli and I met him through him.

Q. Is that the Mr. Zaboli you just referred to earlier as your manager at Imperial Motors?

A. Absolutely.

(Page 27) BY MR. O'GRADY:

Q. Did you ever see -- did Al Quiseda and Mr. Lackey know one another?

A. Mr. Al Quiseda knows the name of Lackey, but I don't believe that he met Lackey, or he might have met Lackey at Forestal (phonetic) Auto Sales.

(Page 32) BY MR. O'GRADY:

Q. Now then you said primarily Farshad Ramazani was your supplier from California?

A. Yes, I did.

Q. Did Farsahd Ramazani know Mr. Lackey?

A. No, he doesn't.

Q. Who was you supplier in Florida?

A. The guy named Kevin. I don't know his last name.

Q. Did you meet with him?

A. Yes, Sir.

Q. Did Kevin know Craig Lackey?

A. No, sir.

(Page 39) BY MR. O'GRADY:

Q. What did Mr. Zaboli tell you about his own dealings with Mr. Lackey?

A. Zaboli was distributing cocaine to Mr. Lackey. The reason I say that is because he was telling me this was for Lackey, and I was giving it to Mr. Zaboli, and Zaboli would take it to Lackey because he knew how to deal with Mr. Lackey a lot better than I did.

DIRECT EXAMINATION OF JAMEEL SINDI

(Page 42) BY MR. O'GRADY:

Q. Do you know Craig Lackey?

A. Craig Lackey, I heard the name Craig Lackey but I never meet him before. I was

going to buy a car, and Amin says he has a friend named Craig Lackey who sells cars. He have a Porsche at his house. If you want to go to his house, you want to take a look.

I said okay. So he picked me up and we went to his house in Arlington. He had a Porsche, 1983, five-speed, sunroof. So we went to his house, went inside. Amin before going there, Amin told me he usually buy a cars with the coke from Craig Lackey and he give him good price because he give him coke, he get a car. That's how he buy cars from him.

So we went inside. Also he had one ounce of coke with Amir. We went inside. Craig Lackey, he was sitting watching TV --movie. He had underwear on.

(Page 43) BY MR. O'GRADY:

Q. You indicated Mr. Tabar had an ounce of cocaine with him when he came in. Did you see what he did with the cocaine?

A. Yes, he give it to Craig Lackey.

Q. Were you ever with him on any other occasion when Tabar distributed cocaine to Mr. Lackey?

A. It was a second time also. I didn't buy the car that time because he was asking $22,000. It was expensive. The next time I meet Tabar, he comes to me. He says Craig Lackey have an Alpha Romero, 1985 convertible, red. He said you want to go to his house and maybe get a good price? I said okay.

So I went with Amin to his house but I didn't go inside. I stayed outside. Amin went to get a key, and he told me he have coke to deliver to him. He was talking about half an ounce.

DIRECT EXAMINATION OF NASSAR ZIARATI

(Page 46) BY MR. O'GRADY:

Q. How did you become associated with Mr. Lackey?

A. I saw him at the Imperial Motors like two years ago. He used to come over there selling cars, buying cars.

Q. Please speak up, if you would.

A. He used to come to Imperial Motors to sell cars and buy cars. I saw him buying coke from Amin at that time. And after that, I went to his house like I guess 20 times, something like that, with Amin Tabar when he gave him coke. And one time Amin gave him coke for $1,200, and he gave him a check. So Amin gave me the check. I deposited it in the account. The check was bcunced because it was a bad check.

(Page 47) BY MR. O'GRADY:

Q. You indicated that you went 20 times to the home of Mr. Lackey?

A. At least.

(Page 47) BY MR. O'GRADY:

Q. Were you with anybody?

A. Yes.

Q. Were you always with Tabar?

A. Yes.

DIRECT EXAMINATION OF ROBERT J. HICKEY, JR.

(Page 108) BY MR. O'GRADY:

Q. Did you ask him then about his involvement in cocaine-related activity?

A. Yes, I did.

Q. If you would say, what was his response to your question?

MR. MAUPIN: Your Honor, may I voir dire the witness to find out about whether he was under intoxicants or not?

THE COURT: Okay.

(Page 110) BY MR. O'GRADY (Direct Examination Resumed):

Q. What did he tell you about his involvement with Mr. Tabar?

A. He -- I don't know who Kabar is. What he told me was that he first purchased cocaine from a man, Iranian man named Lee, and Lee

went to prison, and after that he was purchasing his cocaine from a Amir, A-m-i-r. He said he didn't know whether that was his first name or his last name.

Q. Did he indicate where that person lived?

A. In Springfield someplace.

Q. Did he indicate whether he had used Amir's beeper to get in touch with him to purchase cocaine?

A. Yes.

Q. Did he attempt to give you the number of the beeper itself?

A. Yes. As he could recall it.

Q. Could he recall the whole number at that time?

A. No. He couldn't remember the last digit.

Q. Did he indicate to you how many times Amir had distributed cocaine to him?

A. He said about 50 times.

Q. All right. Did he indicate where those transactions took place?

A. At his home.

Q. Did he indicate whether there were the sale of automobiles involved with the distributions of cocaine form Amir?

A. Yes.

Q. What did he say about that?

A. He said the way he paid for cocaine was by selling cars to Amir at a reduced price.

Q. Did he tell you that Amir was in the used car business as he was?

A. Yes.

Q. And, I think you have stated, but did he indicate when the last time prior to his arrest had been that he tried to get cocaine from Amir?

A. Well, first he said it was two months prior. But then he said that the night before, on February 15th, he had gotten a little drunk and he had called Amir and tried to buy some cocaine.

MR. O'GRADY: Your Honor, that's all of the questions I have of Special Agent Hickey.